Supreme Court of the United States

No. [illegible]

PEERLESS PRODUCTS INC. [illegible] MARSHALL MALTZ, ROSE MALTZ and SHIRLEY MALTZ, individually and [illegible] of said corporation,

v.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960

No.

PEERLESS PRODUCTS, INC., a corporation, MARSHALL MALTZ, ROSE MALTZ and SHIRLEY MALTZ, individually and as officers of said corporation,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice
and the Associate Justices
of the Supreme Court of the United States:

Petitioners, Peerless Products, Inc., Marshall Maltz, Rose Maltz and Shirley Maltz, individually and as officers of said corporation respectfully pray that a writ of certiorari issue out of this court to review the judgment of the United States Court of Appeals for the Seventh Circuit, confirming a "Cease and Desist" order of the Federal Trade Commission.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered November 30th 1960. Petition for rehearing was denied on December 29th, 1960. The opinion of the Court of Appeals for the Seventh Circuit has not yet been reported, but is set out in the Appendix A. The order of the Federal Trade Commission, and its opinion both issued March 22nd 1960, and appear in the record at 90.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED

(1) Since the jurisdiction of the Federal Trade Commission relates to matters of trade in commerce, does its jurisdiction extend to non-trade matters such as involved in awarding cash prizes to winners playing punch boards?

(2) Has the Federal Trade Commission jurisdiction to order petitioners to cease and desist shipment of plain punch boards in interstate commerce, when their shipment is not intended for use in matters of trade or merchandising?

(3) Has the Federal Trade Commission jurisdiction and authority to bar shipments in interstate commerce of plain punch boards when their substantial use has been in games devised to award money as prizes to winners?

(4) May the Federal Trade Commission issue a cease and desist order to bar or restrain shipments of such plain punch boards into localities where, by local law, their use is permitted in games awarding either money or merchandise as prizes to winners playing the punch boards?

(5) Does the fact that plain punch boards may get into hands of operators, not directly from shipper, who will use them in games where merchandise is won in playing, justify a cease and desist order against their shipment to purchasers who will not use them as merchandising or trade boards?

(6) Has the Federal Trade Commission jurisdiction to issue a cease and desist order so extensive as to bar all shipments of such plain punch boards regardless of the use to which they are to be, or may eventually be, put by operators.

THE STATUTE INVOLVED

The statute involved is 15 U. S. C. A. Sec. 45 (a) (6). The pertinent provisions of the act reads: "Unfair methods of competition in commerce, and unfair or deceptive acts in commerce, are declared unlawful."

ORDINANCES INVOLVED

The ordinances involved are set forth in full in the Supplemental Appendix.

STATEMENT OF THE CASE

The Federal Trade Commission filed a complaint against petitioners in which it charged them with selling and distributing punch boards "which were so arranged as to involve games of chance when used in making sales of merchandise to the public." The complaint also charged that "the only use to be made of said punch board devices and the only manner in which they are used by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance, as hereinabove alleged."

The Commission first conducted hearings on that complaint in Chicago, Illinois and in Seattle, Washington. There was no evidence that punch boards were used in Chicago. In Seattle, Washington, the proof was directed solely towards establishing a merchandising use of both merchandise boards and plain punch boards. There was no inquiry as to the use of such plain punch boards for awarding money as cash prizes.

The merchandise boards were prepared by petitioner with printed legendary matter on the upper part, above the perforating area, of the boards. The plain boards bore no printed legendary matter. Both types of boards were there shown to be used by retailers in dispensing merchandise. However, their use in Seattle, Washington, and other cities and a county, were shown to be valid by virtue of ordinances of the cities of Bremerton, Seattle and Aberdeen, Washington, and of Kitsap County, Washington. In the ordinances validating the merchandising use of punch boards they refer to them as "trade stimulants".

The proofs were closed and the Hearing Examiner, without any inquiry into the extent or possible use of the boards

for awarding cash prizes, made his initial decision in which he stated that, "Respondents [present petitioners] sell and distribute their punch boards to various dealers in merchandise, who in turn assemble said punch boards together with various articles of merchandise and sell and distribute them to retailers in the various states, who in turn sell the merchandise, by means of such punches, or chances, to members of the purchasing public. These punch boards are so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used by retailers in the sale and distribution of merchandise to the public. They are of many kinds, all of which, although varying in detail, involve the same features of chance or lottery. Many of respondents' punch boards have blank spaces on the faces thereof so that the purchasers thereof may place instructions or legends thereon, usually the winning numbers and the prizes, which explain the manner in which said devices are to be used in the sale of various specified articles of merchandise. Others already have the legends printed thereon with such explanatory material. All of them are used by the dealer in distributing merchandise in the same manner."

The Commission, on appeal, having had pointed out to it the existence of local laws validating the use of punch boards in that area, vacated the initial decision and remanded the case to the Hearing Examiner "for the receiving of such proper evidence as may be offered showing the extent to which the practices herein alleged to be unlawful have been or are engaged in, in 'commerce', as that term is defined in the Federal Trade Commission Act."

Thereupon, hearings were conducted in Cleveland, Ohio, and Pittsburgh, Pennsylvania. At those hearings, the proof offered by the Commission centered about the use of plain punch boards. There was no proof or claim that mer-

chandise boards were shipped to that area. The proof showed that plain boards were fashioned by operators into types of games to be played with the boards; that this was done by the operators fashioning a "flare" or strip that they would place above the perforating section of the punch boards indicating the type of game to be played and the prizes to be won. Commonly, to such plain boards "flares" were attached by the operator, which stated that only money prizes were to be won. Likewise, commonly, some were fashioned by the retailers to award merchandise as prizes. In many instances the retailers using the punch boards with "flares" of their own devising, and that they affixed, did not purchase the punch boards from petitioners. As a matter of fact the witnesses who testified to seeing punch boards in use were unable to state that the punch boards which they saw exhibited or in play, were those sold by petitioners. The extent of use was not shown.

The witnesses called by the Commission who testified at the hearings held in Cleveland and Pittsburgh, were as follows: Paul B. Shaffstall (59); Peter Rufo (65); Richard Scrabota (71); Ezra Whiteman (76) and Ted Rosson (79). There was a stipulation that if one John David was called as a witness he would testify substantially as did the 3 preceding witnesses (81).

Upon close of proofs, after the hearings pursuant to the remanding order, and although the evidence then showed that the common use of the plain boards was not alone for the specific purpose of dispensing merchandise as prizes, but was as substantially for dispensing cash prizes, made his decision termed "Initial Decision upon Remand" in which, under the title "The Unlawful Practices," he adopted verbatim the language quoted above from his initial decision. This second decision of the Hearing Examiner did, however, state "some of these devices may be and have been used to distribute cash

prizes, but the primary and usual use is for the sale and distribution of merchandise." This conclusion is now and has been challenged by petitioners here.

The United States Court of Appeals for the Seventh Circuit, in its opinion, did not review the testimony of the several witnesses, but instead, stated that

> "There was substantial testimony from petitioners' customers that they easily had adapted these plain boards for the distribution of merchandise by lottery, and that the adapted boards were used primarily to distribute merchandise rather than cash prizes. In addition, there was testimony that in certain instances, Peerless furnished its customers with 'flares' (legends describing prizes and winning numbers) which they could attach to plain boards in adapting them for the distribution of merchandise as prizes."
>
> "The evidence in this case fully supports the Commission's findings, and under such circumstances, the Commission properly issued its cease and desist order against petitioners. 15 U. S. C. A. Sec. 45 (a) (6). By the sale and interstate shipment of its punch boards, petitioners have supplied and placed in the hands of third persons the means of and instrumentalities for engaging in unfair acts of distributing merchandise by lottery in violation of the Act. Since the evidence indicates that such punch boards were designed and used primarily for the distribution of merchandise by lottery, it is no defense that in the main, third parties attached to the boards the legends of winning numbers and merchandise prizes or that such boards could possibly be adapted as money boards giving only cash prizes."

The Court of Appeals also ignored or overlooked the fact that the only State or portion of a State where "flares" were shipped, was in the State of Washington and that the petitioners did not furnish them to any buyers or operators of punch boards, elsewhere. That court also seemed to stress the proposition that the boards were easily

adapted to a merchandising use and therefore, the fact that they were commonly used and fashioned by operators for awarding money prizes, was no deterrent to the Commission's issuance of an unlimited cease and desist order; that the former circumstance, so tainted shipments in interstate, that because of it, shipments of punch boards to be used in awarding cash prizes came within the province of power of the Federal Trade Commission to the extent that every use of the punch boards could be curtailed, merely on the chance that a punch board might get into the hands of an individual who would use it in merchandising.

The Court of Appeals also took the view that even though the devices could lawfully be used in some areas, if not shipped in interstate commerce, and that no complaint of unfair trade practices within such area could be successfully voiced by any opposing the use, nevertheless, the Commission could prevent the interstate shipment of punch boards, to such areas.

REASONS FOR ALLOWANCE OF THE WRIT

(1) The decision expands the jurisdiction and power of the Federal Trade Commission beyond the clear import of the Federal Trade Commission Act.

(2) The effect of the decision is to grant to the Federal Trade Commission power to control and direct that devices that do not affect trade, may, merely because they are in commerce, be barred from interstate shipment.

(3) The decision empowers the Federal Trade Commission to regulate the morals of a community.

(4) The asserted power of the Federal Trade Commission encroaches upon and is in conflict with the inherent and sole rights of the individual states to regulate within their borders, the matters of morals and gambling.

ARGUMENT.

This case has two facets. The first involves the cease and desist order of the Federal Trade Commission thereby prohibiting petitioner from shipment of merchandising punch boards into states where the use of such punch boards is validated by local laws. The second challenges the jurisdiction of the Federal Trade Commission to bar all shipments in commerce of plain punch boards, albeit very substantial use has been clearly demonstrated by the evidence in this case to be, to provide cash prizes to winners and not merchandise.

Generally each state has the exclusive right within its boundaries to deal with gambling as it sees fit. It also has that right with respect to trade operations, limited, however, to the extent that its trade practices and regulations may unfairly affect commerce between the states. "Intrastate activity must have some effect extrastatewise to be controlled by the United States." (*U. S.* v. *Darby*, 85 L. ed. 395; 61 Sup. Ct. 451; 132 A. L. R. 1430). Heeding such inherent state rights Congress has not interfered by legislation to prevent gambling in states that, by their laws, permit gambling. "In the absence of congressional legislation on the subject, laws which are not regulations of the commerce itself, or its instrumentalities, are not forbidden, even though they affect interstate commerce. (*U. S.* v. *Darby, supra*). In *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 61 Sup. Ct. 580, 582, this court said:

> "When, in order to protect interstate commerce, Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly."

The interference by the Federal Trade Commission with the shipment of punch boards in such areas is an unconferred assumption of jurisdiction and an encroachment upon state rights. It constitutes a usurpation of state inherent and undelegated rights and powers. When local laws permit the use of punch boards for trading or merchandising purposes, or for awarding cash prizes, the pertinent legislation establishes the public policy within the area of the states, permitting such activity.

In the State of Washington, the inquiry was limited to the use of punch boards in trade or merchandising. There was no inquiry into the use of plain boards there, for awarding cash prizes. The issue there devolved on the use of punch boards in awarding merchandise as prizes to licensed operators under local laws. The record is, therefore, silent as to the extent of the use of punch boards in the State of Washington, other than in awarding merchandise prizes. The evidence in Seattle, Washington, was that merchandise punch boards bearing legends denoting their specific trade or merchandising uses, were shipped there. There was also evidence that plain punch boards were shipped there, to which operators added "flares" of their own design which designated merchandise to be won as prizes. The shipment by petitioners of merchandising or trading punch boards as the record discloses, was distinctly confined to areas in the State of Washington where their use was valid by local ordinances. It is noteworthy that punch boards manufactured in the State of Washington and sold to operators in that state, even if they are used in trade or for merchandising transactions, are beyond the power of the Federal Trade Commission to interfere with that local activity, (*Federal Trade Commission* v. *Bunte Bros. supra*). The result of the Commission's action then, in preventing shipment of punch boards to that area, does not prevent the activity from continuing in that area, but

instead, effectuates a monopoly in favor of local manufacturers in that state as against those who would ship into it. All that is accomplished by the action of the Commission is that manufacturers of punch boards in the State of Washington, have a monopolistic advantage over those who would ship there, in commerce. Congress has not, by specific enactment, made it illegal to ship punch boards, as it has done specifically, with respect to some gambling devices. Congress has not seen fit to make the shipment of punch boards illegal, although we can fairly assume, that its members have knowledge of such shipments and have given the matter consideration.

In the proceedings had in Cleveland, Ohio and Pittsburgh, Pennsylvania, after the Federal Trade Commission remanded the case for the taking of additional evidence, there was no evidence of shipment of "merchandise" or "trade" boards. All the evidence centered about the shipment and eventual use of plain punch boards, only. The witnesses appearing were all called by the Commission. They all testified that there was a real substantial use of such plain boards in awarding cash prizes.

The following were the witnesses called. Shafstall who testified to seeing cash prizes won in play on plain punch boards, (61) and that the use of plain punch boards in merchandising transactions was a rarity (62).

Peter Rufo next testified that he saw plain punch boards used in gaining cash prizes (68, 69).

Richard Sorabota next testified and when asked by the attorney for the Commission, (Q.) Do you have any use for plain punch boards other than to make up deals to sell merchandise with? (A.) Well, that is all they are for, for making up money boards and making up merchandise boards. (Q.) You make up money boards out of plain boards? (A.) That's right (75).

Whiteman next testified. He was asked by the Commission's attorney:

Q. Mr. Whiteman, have you ever seen a plain board made up with a legend for a money board?

A. Oh, I have seen them make it up as a money board. I know some of the clubs they want to give their members—say a good play, speaking that way—they put $40 worth of money on a $50 board just so they make a ten dollar bill. I saw that already because they use them out our way quite freely, but I never saw much of it down town. You know, office workers going in a store room or cigar store. You wouldn't see that, because they usually figure a larger profit. They got boards already made up, money boards that were already made up. (78, 79)

The next witness, Ted Rosson, was asked by the Commission's attorney,

Q. Do you have any other purposes for plain boards other than—

A. We sold some plain. Some were bought outright by clubs. Mainly clubs, I would say, and they would make them into what they call trade boards. They put OO which means fifties, or numbers ending in 50 which would mean $1.00 or something like that. They would make it into a money board. • • • (80)

Q. In your own business do you have any other uses for plain boards other than to sell your merchandise?

A. No. Well, yes, if we sold them blank. I mean, if we sold them 100 per cent blank. (80) • • •

On cross examination,

Q. Now, without asking you to name specific places or a time, have you known plain boards to be used by purchasers from you who used it for money play?

A. You mean, plain boards?

Q. Yes.

A. Well, I'd say some of the clubs.

Q. Have you known it so to be?

A. Yes, I have known it so to be used. (81)

It was also stipulated in the record that if one John David were called he would testify substantially as the three previous witnesses above had done (81).

There was no evidence that the plain boards introduced as exhibits were those sold by petitioners here, but it was clearly established that any "flares" put on the plain boards were devised without any direction or suggestion from petitioners here.

Despite the foregoing evidence the Commission issued the unlimited cease and desist order which was affirmed by the U. S. Court of Appeals.

It barred shipments of plain boards to operators who would not use them in trade, but would use them in giving cash prizes. This must be beyond the jurisdiction and power of the Commission. The express purpose of the Federal Trade Commission Act is to prevent unlawful trade practices in commerce. If trade is not involved, the Commission has no jurisdiction to impose or enforce a cease and desist order.

If trade be in a measure involved, but likewise there is an area where trade is not involved, to the extent that trade is not involved, the power of the Commission to enter a cease and desist order, is absent. Merely because the punch boards may by some action of operators in designing "flares" make them useable for trade purposes, does not confer a jurisdiction in the Commission to prevent

all shipment when it is plainly shown that the use of the plain punch boards is commonly for the purpose of awarding cash prizes. While plain boards can be converted by operators into games where merchandise is the prize won, nevertheless in order to dispense merchandise through such board it is the operator who must devise the game to be played whereby merchandise may be won as prizes. The fact that such action may occur is not sufficient to disregard the other plain fact that plain boards have other use than to dispense merchandise.

The action of the Federal Trade Commission imposes complete restriction of shipment of plain boards, regardless of their use and regardless of the fact that a merchandising use is not that of the shipper but is occasioned by the eventual operator. It would seem that the prohibition should not be against the shipper when the shipment may not involve trade or be to an area over which the Commission has no jurisdiction of regulation, but rather, instead some sanctions on the eventual user whose actions are condemnatory. *Hague* v. *C.I.O.*, 307 U.S. 496, 83 L. Ed. 1423. The imposition by the Commission of a cease and desist order against all shipping is, under the circumstances, above shown by evidence, too broad to be proper, *Federal Trade Commission* v. *Raladam*, 283 U.S. 643, 51 Sup. Ct. 587, 75 L. Ed. 1324.

CONCLUSION.

It is respectfully submitted that the order of the Federal Trade Commission and the decree of the United States Court of Appeals for the Seventh Circuit affirming same, are unreasonable and confer jurisdiction in excess of the right and power of the Federal Trade Commission; that the order in its broad expanse, encompasses control in areas, beyond the power of the Commission as conferred by Congress.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Seventh Circuit, to the end that this cause may be reviewed and determined by this court; and that the judgment of the Court of Appeals for the Seventh Circuit, be reversed and that your petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

SIMON HERR

Attorney for Petitioners

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM AND SESSION, 1960.

No. 13034

PEERLESS PRODUCTS, INC., a corporation and MARSHALL MALTZ, ROSE MALTZ and SHIRLEY MALTZ, individually and as officers of said corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review and To Set Aside An Order of the Federal Trade Commission.

NOVEMBER 30, 1960.

Before HASTINGS, *Chief Judge,* DUFFY and MAJOR, *Circuit Judges.*

HASTINGS, *Chief Judge.* This is a petition to review and set aside an order of respondent Federal Trade Commission requiring petitioners Peerless Products, Inc., a corporation, and Shirley Maltz, as an officer of Peerless, and Marshall Maltz, individually and as an officer of Peerless,[1] to cease and desist from "[s]elling or distributing

[1] The Hearing Examiner dismissed additional charges in the Commission's complaint against Shirley Maltz, individually, and against Rose Maltz, individually and as an agent of Peerless.

in commerce * * * punchboards or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme." Such order was issued at the conclusion of the normal administrative process within the Commission.

At the outset, we reaffirm that the "law is now firmly established that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, including push cards such as we save here, is contrary to the established public policy of the United States and the sale and distribution, in interstate commerce, of such devices designed for the purpose of selling merchandise by games of chance or lottery is violative of the Federal Trade Commission Act."[2] *Surf Sales Company* v. *Federal Trade Commission,* 7 Cir., 259 F. 2d 744, 746 (1958). See the multitude of cases to the same effect cited in *Max H. Goldberg* v. *Federal Trade Commission,* 7 Cir., ... F. 2d ..... (October 17, 1960).

Petitioners first contend that the evidence is not sufficient to sustain the Commission's order. An examination of the evidence in the record reveals that petitioners shipped punchboards from Peerless' plant in Chicago, Illinois, to customers in Ohio, Pennsylvania, and Washington. These punchboards were of a conventional type, similar in construction to those which have been the subject of repeated litigation in many cases before this court. *Cf., James* v. *Federal Trade Commission,* 7 Cir., 253 F. 2d 78, 79-80 (1958). Most of the boards were "plain

[2] The pertinent provision of the Act, 15 U.S.C.A. § 45 (a) (1), reads:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

boards" which had no legend printed upon them designating the winning numbers and prizes. However, there was substantial testimony from petitioners' customers that they easily had adapted these plain boards for the distribution of merchandise by lottery and that the adapted boards were used primarily to distribute merchandise rather than cash prizes. In addition, there was testimony that in certain instances Peerless furnished its customers with "flares" (legends describing prizes and winning numbers) which they could attach to plain boards in adapting them for the distribution of merchandise as prizes.

The evidence in this case fully supports the Commission's findings, and under such circumstances the Commission properly issued its cease and desist order against petitioners. 15 U.S.C.A. § 45 (a) (6). By the sale and interstate shipment of its punchboards, petitioners have supplied and placed in the hands of third persons the means of and instrumentalities for engaging in unfair acts of distributing merchandise by lottery in violation of the Act. Since the evidence indicates that such punchboards were designed and used primarily for the distribution of merchandise by lottery, it is no defense that in the main third parties attached to the boards the legends of winning numbers and merchandise prizes or that such boards could possibly be adapted as money boards giving only cash prizes.

In its brief and on oral argument the Commission concedes that it has no statutory authority to regulate the flow in interstate commerce of punchboards designed and intended to be used solely as money boards. This question, however, is not before us here, since the Commission's

order is explicitly limited to the shipment of punchboards or other devices designed or intended to be used in the sale or distribution of merchandise.[3]

Petitioners, in addition, contend that local policy sanctioning the use of merchandise boards, evidenced here by certain municipal ordinances in the State of Washington, limits the power of the Commission over unfair or deceptive acts of competition in interstate commerce. We disagree. Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority under 15 U.S.C.A. § 45 (a) (6), can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law. *Royal Oil Corporation* v. *F. T. C.*, 4 Cir., 262 F. 2d 741, 743 (1959). *Lichtenstein* v. *Federal Trade Commission*, 9 Cir., 194 F. 2d 607, 609-10 (1952), cert. denied, 344 U.S. 819. In this case there is no congressional limitation on the Commission's use of its full power to order petitioners to cease shipping in commerce punchboards designed for distribution of merchandise when such shipment is so clearly a violation

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[3] The relevant text of the Commission's cease and desist order follows:

"It is Ordered that respondents, Peerless Products, Inc., a corporation, and its officers, and Shirley Maltz, as an officer of said corporation, and Marshall Maltz, individually and as an officer of said corporation, and respondents' agents, representatives, employees, successors and assigns, directly or through any corporate or other device, do forthwith cease and desist from:

"Selling or distributing in commerce, as 'commerce' is defined in the Act, punchboards or other devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

of federal policy as indicated in *Surf Sales, supra.* A local ordinance cannot here circumscribe the plenary power granted to the Commission to police unfair and deceptive practices in interstate commerce.

We hold that the Commission's order to cease and desist was properly issued, and it is now affirmed.

It is ordered that the petition for review be denied and that the Commission's order be enforced.

PETITION DENIED.
ENFORCEMENT ORDERED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

THURSDAY, DECEMBER 29, 1960

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. F. RYAN DUFFY, *Circuit Judge*
HON. J. EARL MAJOR, *Circuit Judge*

PEERLESS PRODUCTS, INC. and MARSHALL MALTZ, etc.,
Petitioners,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

No. 13034

Petition for Review of an order of the Federal Trade Commission.

IT IS ORDERED by the Court that the petition for rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

PEERLESS PRODUCTS, INC., a corporation and MARSHALL MALTZ, ROSE MALTZ and SHIRLEY MALTZ, individually and as officers of said corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

No. 13034

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Peerless Products Inc., a corporation, and Marshall Maltz, individually and as an officer of said corporation, petitioners, having filed in this Court on the 26th day of May, 1960, a petition for the review of and to set aside an order to cease and desist issued against Peerless Products Inc., a corporation, against Marshall Maltz and Shirley Maltz as officers of said corporation and against Marshall Maltz individually, on the 22nd day of March, 1960, by the Federal Trade Commission, respondent, in a proceeding before it entitled "In the Matter of Peerless Products Inc., a corporation, and Marshall Maltz, Rose Maltz and Shirley Maltz, individually and as officers of said corporation, Docket Number 6718"; and a copy of said petition having been served upon the Commission; and the Commission having thereafter certified and filed in

this Court, as required by the Federal Trade Commission Act, a transcript of the entire record in the proceeding which resulted in the said order to cease and desist; and the matter having been heard by this Court on briefs and oral argument and this Court having thereafter rendered its decision on the 30th day of November, 1960, affirming the order to cease and desist issued on the 22nd day of March, 1960, as aforesaid, and directing that the said order be enforced;

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the aforesaid petition to set aside the order of the Federal Trade Commission be, and it hereby is, denied;

It Is Further Ordered, Adjudged And Decreed that the said order to cease and desist be, and it hereby is affirmed, and that petitioners Peerless Products Inc., a corporation, Shirley Maltz as an officer of Peerless Products Inc. and Marshall Maltz individually and as an officer of Peerless Products Inc. be, and they hereby are, commanded forthwith to obey and comply with the terms thereof;

It Is Hereby Further Ordered, Adjudged And Decreed that within sixty days (60) after the entry of this decree Peerless Products Inc., a corporation, Shirley Maltz as an officer of Peerless Products, Inc., a corporation, and Marshall Maltz individually and as an officer of Peerless Products Inc., a corporation, shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with the said order to cease and desist;

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the said order to cease and desist; hereby affirmed

and enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

/s/ *John S. Hastings*
/s/ *F. Ryan Duffy*
United States Circuit Judges

Dated: January 4, 1961
A True Copy:

Teste:
/s/ *Kenneth J. Carrick*
Clerk of the United States Court of Appeals for the Seventh Circuit.

(SEAL)

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

WEDNESDAY, JANUARY 4, 1961

Before

HON. JOHN S. HASTINGS, *Chief Judge*

HON. F. RYAN DUFFY, *Circuit Judge*

PEERLESS PRODUCTS, INC. and MARSHALL MALTZ, etc., *Petitioners,*

No. 13034 vs.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Review of an order of the Federal Trade Commission.

On consideration of petitioners' motion for stay of mandate, filed herein on January 3, 1961,

It Is Hereby Ordered by the Court that the execution of the decree of this Court entered on January 4, 1961, be, and the same is hereby stayed for a period of thirty (30) days from this date. However, if within such thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court certifying that the certiorari petition, record and brief have been filed, the stay shall continue until final disposition by the Supreme Court.

A True Copy:
Teste:
/s/ *Kenneth J. Carrick*
Clerk of the United States Court of Appeals for the Seventh Circuit.
(SEAL)

Supplemental Appendix

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SUPPLEMENTAL APPENDIX

RESPONDENT'S EXHIBIT NO. 1

380 THE FOLLOWING IS HEREBY CERTIFIED TO BE A TRUE AND CORRECT COPY OF ORDINANCE NO. 1909 PASSED BY THE CITY COUNCIL OF THE CITY OF BREMERTON, WASHINGTON.

By: (Illegible)
Deputy

E. H. T. McGowan, City Clerk

OFFICIAL PUBLICATION

ORDINANCE NO. 1909

An Ordinance relating to regulating and licensing certain punchboards, spindle games, and similar devices, whether used as "trade stimulants" or otherwise; fixing fees; providing for enforcement, and for the issuance and revocation of licenses, by the City Treasurer and prescribing penalties.

THE CITY OF BREMERTON DOES ORDAIN:

Section 1. It shall be unlawful to display, exhibit or expose for use, play or operation, or permit to be used, played or operated any punchboard, spindle game or similar device whether used as a so-called "Trade stimulant" or otherwise, without having a valid and subsisting "Location Owner's Trade Stimulant Device License." A separate license is required for each place of business and the same shall at all times be conspicuously posted and maintained therein. The City Treasurer shall prescribe the form of such license, number the same, and shall indicate thereon the number of such devices which may be exhibited, exposed, used, or played thereunder.

Further, it shall be unlawful to display, exhibit or expose for use, play or operation, or permit to be used, played or operated any punch board, spindle game or similar device whether used as a "trade stimulant" or otherwise, without having affixed to such device a stamp or stamps as required in Section 4 of this ordinance.

Section 2. It shall be unlawful to be or become an operator, which means anyone who owns or exhibits for use, play or operation, or who leases or rents to, or places with others any such device described in Section 1 hereof, without a valid and subsisting license to be designated as "Operator's Trade Stimulant Device License." The City Treasurer shall prescribe the form of such license.

It shall be unlawful for any operator in any place not covered by the required location license, to display or exhibit for use or play, or to lease or rent to another for any such purpose, any such device.

Further, it shall be unlawful for any operator to display or exhibit for use or play or to lease or rent to another for such purpose any such device without having first affixed thereto a stamp or stamps as required in Section 4 of this ordinance.

Section 3. It shall be unlawful for anyone to be or become a Wholesale Distributor of any such device as described in Section 1 hereof without having a valid and subsisting license to be designated as "Wholesale Distributor's Trade Stimulant Device License," which license shall at all times be conspicuously posted and maintained at the place of business of the distributor in Bremerton; provided only one such license shall be required for each one engaged in such business without regard to the number of individual salesmen employed and if no place of business is maintained in Bremerton, the license or a copy shall be carried by such salesman and exhibited to any agent of the City Treasurer or to any police officer upon request.

The City Treasurer shall prescribe the form of such license.

Section 4. The license year shall be from July 1 to June 30th, and license fee shall be payable on the annual basis. Any license issued on and subsequent to January 1 in any one year the fee therefore shall be one-half the annual fee. The annual fee for the license shall be as follows:

Locations Owner's Trade Stimulant Device License —$7.50 per annum for three such devices and $5.00 per annum for each such additional device.

Operator's Trade Stimulant Device License—$100.00 per annum.

Wholesale Distributor's Trade Stimulant Device License—$100.00 per annum.

Every person coming within more than one of the above classifications provided in this section shall pay the full license fee required of each particular classification.

In addition to the license, suitable stamps in the form prescribed by the City Treasurer shall be affixed to each such device as is described in Section 1 hereof, by the Wholesale Distributor, before such device may be leased, displayed, used or sold in the City of Bremerton, and the fee for each such stamp shall be an amount equal to 4% of the potential value or yield of any such device. Such value shall be determined by multiplying the number of tickets or slips used in or on each device, by the money purchase price of each such ticket or slip, irrespective of the method of attachment of each to the device.

Section 5. It shall be unlawful to sell, exchange, display, or exhibit for use or operation in the City of Bremerton any such device described in Section 1 hereof unless the same shall have indelibly printed, painted, stamped or impressed thereon, the name and address and telephone number of the Wholesale Distributor thereof; and if rented, leased, displayed or exhibited by an operator, the name and address and telephone number of the Operator shall also be indelibly printed, painted, stamped or impressed there-

on, and no such license shall be issued to any one not a resident of the City of Bremerton.

Section 6. It shall be unlawful to sell, operate or use or permit to be operated or used, or to possess, exhibit or display any such device as is described in Section 1 hereof which may be used for gambling or for playing a game of chance thereon, or to sell or display for purposes of sale or to keep, maintain or operate or permit to be kept, maintained or operated any such device which is so constructed as to automatically make a direct pay-off in cash, checks or tokens, or to circulate trade checks, trade certificates or slugs in connection with the operation of any such device and all prizes shall be payable solely in merchandise.

Section 7. It shall be unlawful for anyone under the age of twenty-one years to play or operate any device such as is described in Section 1 hereof and it shall be unlawful for any operator or any owner of any such device or for any manager or other person in charge of premises where such device is kept, maintained or operated or permitted to be kept, maintained or operated, to permit or allow anyone under twenty-one years of age to play, operate or use any such device.

Section 8. The City Treasurer, with the approval of the City Council, may adopt and enforce rules and regulations not inconsistent with this ordinance for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with any such rules or regulations.

Section 9. No location license shall be issued for, nor shall any such device as described in Section 1 hereof be used or operated in any building or place within three hundred (300) feet of the grounds or building of any school.

Section 10. The City Treasurer shall be primarily responsible for and it shall be his duty to enforce the pro-

visions of this ordinance; but this shall not preclude the assistance and enforcement of this ordinance by the Chief of Police. If the City Treasurer shall find that any licensee has violated any provision of this ordinance, he shall make a written record of such finding, and shall specify therein the particulars and he may in his discretion revoke the license, and with the consent of the City Council revoke the license or suspend it for a period to be fixed by him, in which event the license shall be surrendered to said City Treasurer and cancelled by him in case of revocation, or returned to the licensee on expiration of the period of suspension and in the case of an Operator's license, City Treasurer shall remove the device described in Section 1 hereof, provided such revocation or failure to revoke for violation of any of the provisions of this ordinance shall not relieve the licensee of the penalties provided in Section 13 hereof. Any licensee whose license is revoked or suspended shall have the right to appeal to the City Council from such revocation or suspension by filing with the City Treasurer, a written notice thereof within five (5) days after the entry of the order of revocation or suspension. The notice of appeal shall specify an address at which the licensee may be given notice of hearing on the appeal. The City Council shall hear the appeal, or may refer the same to a committee for hearing. At the hearing, the licensee shall be entitled to appear in person and offer evidence pertinent to the revocation or suspension; and the City Treasurer shall likewise be entitled to be heard at the hearing and offer evidence in support of his order of revocation or suspension. The City Council shall determine by resolution whether the revocation or suspension shall be sustained, and its action in that respect shall be final and conclusive. From the time of filing the written notice of appeal until the hearing and action by the City Council, the order of the Treasurer of revocation or suspension shall be ineffective.

Section 11. It shall be unlawful for a Wholesale Distributor to buy or advance the fee for a location license and unlawful for a location licensee to accept the fee from a wholesaler or an operator.

Section 12. In addition to other penalties provided for herein, any device coming within the provisions of this ordinance for which no license has been obtained or which does not have attached thereto a suitable stamp or stamps as provided in Section 4 hereof or any device which is used or possessed in violation of the provisions of this ordinance, even though licensed, is hereby declared to be a nuisance, and may be confiscated by the City Treasurer or by his authorized agent and destroyed.

Section 13. Penalties. Any violation or failure to comply with any of the provisions of this ordinance shall subject the offender to a fine in any sum not exceeding three hundred dollars ($300.00) or imprisonment in the city jail for a period not exceeding ninety (90) days, or to both such fine and imprisonment.

Section 14. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor, otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

APPROVED by the City Council of the City of Bremerton on first reading this 24th day of November, 1950.

Passed on final reading the 1st day of December, 1950, signed by the Mayor and attested by the City Clerk in authentication of such passage the 1st day of December, 1950.

Lulu D. Haddon,
Acting Mayor.

Attest:
E. H. T. McGowan,
City Clerk.

Dec. 2

RESOLUTION NO. 755

WHEREAS, the assessment roll for Local Improvement District No. 244, providing for the assessment to pay the improvement of Perry Avenue from E. 13th Street to E. 16th Street has been filed with the City Clerk of the City of Bremerton.

NOW THEREFORE, be it resolved that Wednesday the 20th

382 RESPONDENT'S EXHIBIT NO. 2

ORDINANCE NO. 79335

AN ORDINANCE relating to regulating and licensing certain punchboards, spindle games, and similar devices whether used as "trade stimulants" or otherwise; fixing fees; providing for enforcement, and for the issuance and revocation of licenses, by the City Comptroller and prescribing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. It shall be unlawful to display, exhibit or expose for use, play or operation, or permit to be used, played or operated any punchboard, spindle game or similar device whether used as a so-called "trade stimulant" or otherwise, without having a valid and subsisting "Location Owner's Trade Stimulant Device License." A separate license is required for each place of business and the same shall at all times be conspicuously posted and maintained therein. The City Comptroller shall prescribe the form of such license, number the same, and shall indicate thereon the number of such device which may be exhibited, exposed, used, or played thereunder.

Further, it shall be unlawful to display, exhibit or expose for use, play or operation, or permit to be used, played, or operated any punchboard, spindle game or similar device whether used as a "trade stimulant" or

otherwise, without having affixed to such device a stamp or stamps as required in Section 4 of this ordinance.

Section 2. It shall be unlawful to be or become an operator, which means anyone who owns or exhibits for use, play or operation, or who leases or rents to, or places with others any such device described in Section 1 hereof, without a valid and subsisting license to be designated as "Operator's Trade Stimulant Device License." The City Comptroller shall prescribe the form of such license.

It shall be unlawful for any operator in any place not covered by the required location license, to display or exhibit for use or play, or to lease or rent to another for any such purpose, any such device.

Further, it shall be unlawful for any operator to
383 display or exhibit for use or play or to lease or rent to another for such purpose any such device without having first affixed thereto a stamp or stamps as required in Section 4 of this ordinance.

Section 3. It shall be unlawful for anyone to be or become a Wholesale Distributor of any such device as described in Section 1 hereof without having a valid and subsisting license to be designated as "Wholesale Distributor's Trade Stimulant Device License," which license shall at all times be conspicuously posted and maintained at the place of business of the distributor in Seattle; provided only one such license shall be required for each one engaged in such business without regard to the number of individual salesmen employed and if no place of business is maintained in Seattle, the license or a copy shall be carried by such salesman and exhibited to any agent of the City Comptroller or to any police officer upon request. The City Comptroller shall prescribe the form of such license.

Section 4. The license year shall be the calendar year. All license fees shall be payable on the annual basis and where the license is issued on and subsequent to July 1

in any year, the fee therefor shall be one-half the annual fee, which annual fee shall be as follows:

Location Owner's Trade Stimulant Device License—$7.50 per annum for three such devices and $5.00 per annum for each such additional device.

Operator's Trade Stimulant Device License—$100.00 per annum.

Wholesale Distributor's Trade Stimulant Device License—$100.00 per annum.

Every person coming within more than one of the above classifications provided in this section shall pay the full license fee required of each particular classification.

In addition to the license, suitable stamps in the form prescribed by the City Comptroller shall be affixed to each such device as is described in Section 1 hereof, by the Wholesale Distributor, before such device may be leased, displayed, used or sold in the City of Seattle, and the 384 fee for each such stamp shall be an amount equal to 4% of the potential value or yield of any such device. Such value shall be determined by multiplying the number of tickets or slips used in or on each device, by the money purchase price of each such ticket or slip, irrespective of the method of attachment of each to the device.

Section 5. It shall be unlawful to sell, exchange, display, or exhibit for use or operation in the City of Seattle any such device described in Section 1 hereof unless the same shall have indelibly printed, painted, stamped or impressed thereon, the name and address and telephone number of the Wholesale Distributor thereof; and if rented, leased, displayed or exhibited by an operator, the name and address and telephone number of the Operator shall also be indelibly printed, painted, stamped or impressed thereon, and no such license shall be issued to any one not a resident of the City of Seattle.

Section 6. It shall be unlawful to sell, operate or use or permit to be operated or used, or to possess, exhibit or

display any such device as is described in Section 1 hereof which may be used for gambling or for playing a game of chance thereon, or to sell or display for purposes of sale or to keep, maintain or operate or permit to be kept, maintained or operated any such device which is so constructed as to automatically make a direct pay-off in cash, checks or tokens, or to circulate trade checks, trade certificates or slugs in connection with the operation of any such device and all prizes shall be payable solely in merchandise.

Section 7. It shall be unlawful for anyone under the age of twenty-one years to play or operate any device such as is described in Section 1 hereof and it shall be unlawful for any operator or any owner of any such device or for any manager or other person in charge of premises where such device is kept, maintained or operated or permitted to be kept, maintained or operated, to permit or allow anyone under twenty-one years of age to play, operate or use any such device.

385. Section 8. The City Comptroller may adopt and enforce rules and regulations not inconsistent with this ordinance for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with any such rules or regulations.

Section 9. No location license shall be issued for, nor shall any such device as described in Section 1 hereof be used or operated in any building or place within three hundred (300) feet of the grounds or building of any school.

Section 10. The City Comptroller through the Division of Licenses and Standards of his office shall be primarily responsible for and it shall be his duty to enforce the provisions of this ordinance; but this shall not preclude the assistance and enforcement of this ordinance by the Chief of Police. If the City Comptroller shall find that any licensee has violated any provision of this ordinance, he shall make a written record of such finding, and shall specify therein the particulars and he may in his discretion re-

voke the license, or suspend it for a period to be fixed by him, in which event the license shall be surrendered to said Comptroller and cancelled by him in case of revocation, or returned to the licensee on expiration of the period of suspension and in the case of an Operator's license, Comptroller shall remove the device described in Section 1 hereof provided such revocation or failure to revoke for violation of any of the provisions of this ordinance shall not relieve the licensee of the penalties provided in Section 13 hereof. Any licensee whose license is revoked or suspended shall have the right to appeal to the City Council from such revocation or suspension by filing with the City Comptroller a written notice thereof within five (5) days after the entry of the order of revocation or suspension. The notice of appeal, shall specify an address at which the licensee may be given notice of hearing on the appeal. The City Council shall hear the appeal, or may refer the same to a committee for hearing. At the hearing the 386 licensee shall be entitled to appear in person and offer evidence pertinent to the revocation or suspension; and the City Comptroller shall likewise be entitled to be heard at the hearing and offer evidence in support of his order of revocation or suspension. The City Council shall determine by resolution whether the revocation or suspension shall be sustained, and its action in that respect shall be final and conclusive. From the time of filing the written notice of appeal, until the hearing and action by the City Council, the order of the Comptroller of revocation or suspension shall be ineffective.

Section 11. It shall be unlawful for a Wholesale Distributor to buy or advance the fee for a location license and unlawful for a location licensee to accept the fee from a wholesaler or an operator.

Section 12. In addition to other penalties provided for herein, any device coming within the provisions of this

ordinance for which no license has been obtaind or which does not have attached thereto a suitable stamp or stamps as provided in Section 4 hereof or any device which is used or possessed in violation of the provisions of this ordinance, even though licensed, is hereby declared to be a nuisance and may be confiscated by the City Comptroller or his authorized agent and destroyed.

Section 13. PENALTIES. Any violation or failure to comply with any of the provisions of this ordinance shall subject the offender to a fine in any sum not exceeding three hundred dollars ($300.00) or imprisonment in the city jail for a period not exceeding ninety (90) days, or to both such fine and imprisonment.

387 Section 14. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council the 25th day of September, 1950, and signed by me in open session in authentication of its passage this 25th day of September, 1950.

Robt. H. Harlin
President of the City Council.

The foregoing Bill, after its passage and authentication, and within five days thereafter, was presented to the Mayor, who returned the same to the City Council without his disapproval or approval.

Witness my hand and seal of said city this 4th day of October, 1950.

.....
City Comptroller and Ex-Officio
City Clerk

(SEAL) By W. A. Perine
Published Oct. 7, 1950. Deputy Clerk

389 RESPONDENT'S EXHIBIT NO. 3

ORDINANCE NO. 2185

AN ORDINANCE relating to the regulating and licensing of punchboards, spindle games and similar devices, fixing fees, providing for enforcement and for the issuance and revocation of licenses, repealing Section 6 of Ordinance No. 1909 and amending Section 4 of Ordinance No. 1909, as amended by Ordinance No. 2175.

THE CITY OF BREMERTON DOES ORDAIN:

Section 1. That Section 4 of Ordinance No. 1909, as amended by Ordinance No. 2175 be and the same is hereby amended to read as follows:

"Section 4. The license year shall be the fiscal year. All license fees shall be payable on the annual basis and where the license is issued on and subsequent to January 1st in any one year, the fee therefor shall be one-half the annual fee, which annual fee shall be as follows:

Locations Owner's Trade Stimulant Device License—$7.50 per annum for three such devices and $5.00 per annum for each such additional device.

Operator's Trade Stimulant Device License—$100.00 per annum.

Wholesale Distributor's Trade Stimulant Device License—$100.00 per annum.

Every person coming within more than one of the above classifications provided in this section shall pay the full license fee required of each particular classification.

In addition to the license, suitable stamps in the form prescribed by the City Treasurer shall be affixed to each such device as is described in Section 1 hereof, by the Wholesale Distributor, before such device may be leased,

displayed, used or sold in the City of Bremerton, and the fee for each such stamp shall be an amount equal to 4% of the potential value or yield of any such device. Such value shall be determined by multiplying the number of tickets or slips used in or on each device, by the money purchase price of each such ticket or slip, irrespective of the method of attachment of each to the device."

Section 2. That Section 6 of Ordinance No. 1909 be and the same is hereby repealed.

Section 3. That this Ordinance shall become effective on October 1, 1956, after passage and publication.

APPROVED on first reading this 8th day of August, 1956.

PASSED AND APPROVED by the City Council of
390 the City of Bremerton, signed by the Mayor and attested by the City Clerk in authentication of such passage this 15th day of August, 1956.

.....

H. O. Domstad, Mayor

ATTEST:

.....

E. H. T. McGowan, City Clerk

The Above And Foregoing Is Hereby Certified To Be A True And Correct Copy Of Ordinance No. 2185 passed by the City Council of the City of Bremerton.

.....

Deputy

391 RESPONDENT EXHIBIT NO. 4

ORDINANCE NO. 3974

AN ORDINANCE relating to regulating and requiring the license and payments of fees for the use and operation of certain "trade stimulators," "question and answer boards", and like devices, defining offenses; prescribing penalties; and fixing the effective date of this ordinance.

BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF ABERDEEN:

Sec. 1. DEFINITIONS. A "trade stimulator" or "question and answer board" within the meaning of this ordinance, shall be a board containing a number of holes or receptacles of uniform size in which are placed slips of paper or other substance and which may be punched or drawn from said hole or receptacle by any person desiring so to do, said device or board being commonly known as a "punch board", and which the public, upon payment of a consideration, may punch or draw such paper or other substance from such hole or receptacle and obtain an award.

The term "person" when used in this ordinance shall mean and include any person, firm or partnership, corporation or other association of persons.

Sec. 2. It shall be unlawful for any person, individually or as an agent for another, to sell, lease, distribute or place any board as defined in Section 1, or for any person to have in possession for the purpose of having operated or used on or in said person's premises, or in connection with said person's business any board as defined in Section 1 hereof, without first having obtained a license for the required class and paying the amount of the fee as hereinafter provided.

It shall be unlawful for any person to sell or give

392 away any punch board sticker or stickers, or to provide stickers for use on or in connection with any punch board which such person is not licensed to operate.

It shall be unlawful for any person operating or conducting, or employed in or about, any business where punch boards are kept or used, publicly to exhibit, or to offer for public play, any punch board which does not have attached thereto the required sticker, with the serial number of the board clearly marked thereon in ink.

It shall be unlawful for any person, by subterfuge, trickery, ruse, or other dishonest means, to procure or attempt to procure any article of merchandise, or thing of value whatsoever, through the presenting or exhibiting of a question and answer slip which has not been a part of, and punched from, the merchandise board upon which the claim for merchandise board upon which the claim for merchandise prize is made.

Sec. 3. LICENSEES: Punch Board licensees shall be classified as follows: Class A Licensee shall be any person, who for himself, or as agent or employee of another, is engaged, or engages, in the distribution of punch boards by sale either with or without the merchandise to be delivered as awarded in connection therewith; and such licensee shall not be entitled to procure, nor be permitted to sell, furnish, or supply, stickers for use on any punch board whatsoever.

Class B Licensee shall be any person who for himself, or as agent or employee of another, (and whether with or without merchandise to be delivered as awards in connection therewith), deals in punch board or punch boards by placing with or consigning to another such board or boards in return for, or in anticipation of, the payment or receipt of fee or revenue to be derived from or by reason of
393 the use or operation of such board or boards.

Class C Licensee shall be any person who buys out-

right or makes up any such punch board or boards and operates the same at his own licensed place of business for the promotion of sales of merchandise which he is licensed to sell.

Class D Licensee shall be any person who is a wholesaler of candy products and sells or distributes boards involving and using candy products to not less than 75%.

Individual punch board license fees shall be paid upon each and every punch board by the Class B and Class C and Class D operators before the same shall be used, and a sticker as hereinafter provided shall be placed upon such board, which sticker shall, among other things, show that the required license fee has been paid as provided in Section 4; and the owner, operator, or other person in charge of the premises on which such board is kept or used shall write or cause to be written in ink on the sticker, the serial number of such board; and it shall be unlawful to fail so to do, or to re-use any such sticker.

Every person coming within more than one of the classifications provided in this section shall pay the full license fee required of each particular classification.

All licenses shall show the name of the licensee and his address and such other information as may be determined by the City Comptroller.

Every Class A Licensee shall at all times keep in his principal place of business a record of the number of punch boards sold, together with the names and addresses of the purchasers thereof, and which record shall be open to inspection during all regular business hours. Class A licensees shall furnish to the City Comptroller of
394 the City of Aberdeen such list upon demand and without cost.

Every Class B and Class D licensee shall keep in his principal place of business a record of the number and

location of all boards owned or operated, and/or placed or consigned by him which record shall be open to inspection during all regular business hours. Class B and Class D licensees shall furnish to said City Comptroller such list upon demand and without cost.

Application for licenses shall be made on a form to be provided by the City Comptroller of the City of Aberdeen, and shall contain such information as he may deem necessary.

License for individual boards shall be issued by the City Comptroller upon application and upon demonstrating to his satisfaction that the board to be so licensed is within the visions of the ordinance. Said license shall be in sticker form and must be attached to the board so licensed. Said license shall contain, in addition to the name and address of the person obtaining the same, such other information as the City Comptroller shall deem necessary.

Sec. 4. LICENSE FEES: Class A Annually $100, and no license shall be issued for less than the full annual fee.

Class B Annually $500.00, and no license shall be issued for less than the full annual fee.

Class C Annually $25.00, and no license shall be issued for less than the full annual fee.

Class D Annually $50.00, and no license shall be issued for less than the full annual fee.

The following licenses shall be paid upon individual boards and shall be in addition to the license fees pro-
395 vided for Class B, C and D. (Class A is not entitled to purchase stickers).

Boards having up to and including 500 holes or receptacles	$ 1.00
Boards having 501 to and including 1000 holes or receptacles	2.00

Boards having 1001 to and including 2000 holes or receptacles	4.00
Boards having 2001 to and including 3000 holes or receptacles	6.00
Boards having 3001 to and including 4000 holes or receptacles	8.00
Boards having 4001 to and including 5000 holes or receptacles	10.00
Boards having more than 5000 holes or receptacles	25.00

Sec. 5. The City Comptroller shall adopt a form of stamp to be used as provided for in this ordinance and the City Comptroller shall have power and it shall be his duty from time to time to adopt, subject to the approval of the City Council, rules and regulations not inconsistent with this ordinance for the purpose of carrying on the provisions hereof and it shall be unlawful to violate or fail to comply with any such rule or regulation so adopted after the same has been approved by the City Council and published in one issue of the official newspaper of the City of Aberdeen.

Sec. 6. SEIZURE AND DESTRUCTION: Any board coming within the provisions of this ordinance for which no license has been obtained or which does not have attached thereto the license sticker as herein provided, or any board which is used or possessed in violation of the provisions of this ordinance, even though licensed, shall be subject to seizure, condemnation and destruction. It shall be the duty of the Chief of Police and each and all of those acting under him, as well as the City Comptroller and the License Collector, to examine from time to time all boards found or displayed within the City of Aberdeen and 396 to seize any and all such boards which are not licensed

or which are operated in violation of the terms of this ordinance and to bring about the prosecution of any person violating this ordinance as herein provided for.

Section 7. REGULATIONS: It shall be unlawful for any person licensed under the provisions of this ordinance to place, or permit the placing, any board as defined in Section 1 hereof in any premises or in connection with any business that is located within two hundred (200) feet, measured on street lines of any block, of a public or private school building or church.

It shall be unlawful for any person having such board in his possession, care or custody to permit any person under the age of 21 years to punch the same and it shall be unlawful for any such minor to punch any such board.

The Council shall have the right to revoke or cancel for cause any license granted under the terms of this ordinance and conviction of a violation of the terms of this ordinance shall be deemed just cause for the revocation or cancellation. Conviction of a violation of this ordinance shall be deemed just cause for the cancellation or revocation of any other license held by a licensee under this ordinance.

Sec. 8. INSPECTION: The City Comptroller, or his authorized representative and/or the chief of police or any police officer of the City of Aberdeen shall have free and uninterrupted access to any and all places where any board licensed under the provisions of this ordinance is located during any hour of the day or night when such place is open to the public, or open for members or others if such place be an athletic, business or social club or society, and it shall be a violation of the provisions of this ordi-
397 nance to deny, hinder or refuse admission at any such time to such City Comptroller or his authorized representative and/or the chief of police or any police officer

Sec. 9. PENALTIES: Any person, firm or corporation failing to comply with any of the terms of this ordinance, or violating any of the terms hereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not to exceed $300.00, or by imprisonment in the City Jail for a term not exceeding 90 days, or by both such fine and imprisonment. Each day of violation or failure to comply with any of the terms of this ordinance shall constitute a separate and distinct offense, and be punishable as such.

Sec. 10. The provisions of this ordinance shall be deemed an exercise of the power of the City of Aberdeen to tax for revenue.

Sec. 11. If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Sec. 12. This ordinance shall take effect on January 1st, 1947.

PASSED AND APPROVED this 18th day of December, 1946.

.....

Mayor

Attest:

.....

City Comptroller.

398 AFFIDAVIT OF PUBLICATION

Grays Harbor Post Aberdeen, Washington

ORDINANCE NO. 4040

AN ORDINANCE, amending Section 6 of Ordinance No. 3974 entitled "An Ordinance relating to regulating and requiring the license and payments of fees for the use and operation of certain "trade stimulators," "question and answer boards," and like devices, defining offenses; prescribing penalties; and fixing the effective date of this ordinance."

BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF ABERDEEN:

That Section 6 of Ordinance No. 3974 entitled as above set forth in the title of this ordinance, be and the same is hereby amended to read as follows:

Section 6. SEIZURE AND DESTRUCTION: Any board coming within the provisions of this ordinance for which no license has been obtained or which does not have attached thereto the license sticker as herein provided, or any board which is used or possessed in violation of the provisions of this ordinance, even though licensed, shall be subject to seizure, condemnation and destruction. It shall be the duty of the Chief of Police and each and all of those acting under him, to examine from time to time all boards found or displayed within the City of Aberdeen and to seize any and all such boards which are not licensed or which are operated in violation of the terms of this ordinance and to bring about the prosecution of any person violating this ordinance as herein provided for

PASSED AND APPROVED this 31st day of March, 1948.

Ed Lundgren,
Mayor.

Attest:

Victor Lindberg,
City Comptroller.

Publish April 3, 1948. It

State of Washington,
County of Grays Harbor—ss.

I, Kearny Clark on Oath, declare that I am the Publisher of the GRAYS HARBOR POST, which is a newspaper published in Aberdeen, Grays Harbor County, State of Washington, and of general circulation in said County and State, and that the Ordinance of which the annexed is a printed copy, was published 1 time in the entire and complete list of said newspaper and not in any supplement thereto, on the following dates, *viz.*: April 3, 1948 and that the GRAYS HARBOR POST has been approved as a legal newspaper by order of the Superior Court of Grays Harbor County, and that said newspaper was generally circulated among its regular subscribers during said period.

Kearny Clark

Subscribed and sworn to before me this 5th day of April, 1948.

.....

Notary Public in and for the State of Washington, residing at Aberdeen.

(SEAL)

413 COUNTY ORDINANCE NO. 11.

(With Attached Amendment of January 16, 1956)

AN ORDINANCE of the County of Kitsap, Washington, relating to and regulating "trade stimulants", requiring Licenses, and providing fees for the use and operation thereof, and providing penalties.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS, KITSAP COUNTY, STATE OF WASHINGTON:

Section 1. Definitions.

TRADE STIMULANTS:

Shall mean any device, punchboard, spindle game, or other device dispensing merchandise or cash when used as a trade stimulant or otherwise.

OPERATOR:

Shall mean any person, firm or corporation selling or vending or offering to sell or vend, or who leases or rents to, or places with others, any "trade stimulant," or any location-owner who purchases, leases or rents a trade stimulator from other than a licensed operator and offers the same for use.

LOCATION-OWNER:

Shall mean any person, firm or corporation displaying, exhibiting or exposing for use, play or operation, any trade stimulant in Kitsap County.

Section 2. Every Operator shall pay an annual license fee in the sum of $100.00, payable annually in advance, and upon the payment thereof to the County of Kitsap, such operators shall be issued an OPERATOR'S LICENSE & OPERATOR'S NUMBER, which license shall entitle the said Operator to vend "trade stimulators" to the location

owners in Kitsap County. The license year shall be the calendar year. The Operator's license and the Operator's number shall not be transferable. In addition to the Operator's License fee the operator shall pay license fees for each and every "trade stimulator" used, displayed or exposed to the public within Kitsap County, such license fee to be paid in the form of stamps purchased from the County of Kitsap and used as hereinafter designated. To every "trade stimulator" or similar device used, displayed or exposed to the people of Kitsap County, Washington, there shall be at the time such device is displayed be attached thereto, stamps so purchased from the County Auditor in such amounts as are hereinafter provided.

It shall be unlawful for any operator in any place not covered by the required location license, to display or exhibit for use or play, or to sell, lease or rent to another for such purpose, any "trade stimulator" or device referred to in Section 1 hereof.

Section 3. Every location owner shall pay an annual license fee in the sum of $10.00, payable annually in advance, and upon the payment thereof to the County Auditor of Kitsap County, Washington, such location owner shall be issued a Location Owner's License and a Location Owner's Number, which license shall entitle the said location owner to offer "trade stimulators" for the use and participation at his place of Business in Kitsap County, Washington. The license year shall be the calendar year.

Section 4. In addition to the license, suitable stamps in the form prescribed by the County Auditor shall be affixed to each device as described in Section 1 hereof, by the Operator, before such device may be leased, displayed, used or sold in Kitsap County and the fee for such stamp shall be an amount equal to 1% of the potential value or

yield of any such device or trade stimulant. Such value shall be determined by multiplying the number of tickets or slips used in or on such device, by the money purchase of each such ticket or slips, irrespective of the method of attachment to the device or trade stimulant.

The Operator shall place on said stamps the date of such distribution or display and shall in ink mark the same cancelled, and shall initial the same and write thereon the number of the license held by him as such Operator. After the Operator's number, the word "cancelled" and the Operator's initials or those of his agent or employee have been written across the face of the stamp, it shall be the duty of the person using such stamps to mutilate it in such a manner as to make it impossible to remove the same from the punch board or other device. No stamp or stamps shall be used more than once on any trade stimulant or device and no stamp shall be transferred from one device to another. It shall be the duty of the location owner when purchasing the said trade stimulant to examine the same and require the Operator's license number so designated, to appear on the reverse side of said trade stimulating device.

"Perpetual Type Punchboards" shall be issued a license fee of $2.50 per month for each five cents of sale price on each board, in lieu of the stamp tax hereinbefore provided, which license fee is to be in addition to the annual location Owner's and/or Operator's fee. "Perpetual Type Punchboards", as used in this section, shall mean punchboards which are operated by the use of one or more levers or other similar device which when tripped move the objects used in determining the winning participant into visual tabulating spaces from a reservoir of such objects in the board or device.

Section 5. The stamps for use under the terms of this ordinance shall be provided by the County Auditor, of Kitsap County, in such denominations and in such forms as shall seem right and proper and shall be sold only to those persons holding licenses hereunder and in such quantities as the said Auditor shall determine.

Section 6. The County Auditor, with the approval of the Board of County Commissioners, may adopt and enforce rules and regulations not inconsistent with this ordinance for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with any such rules or regulations.

Section 7. It shall be the duty of the Sheriff of Kitsap County, his deputies and the County Auditor or his deputy, to examine from time to time all such devices found or displayed within the said County of Kitsap, to deter-
417 mine whether such devices are being used, operated and displayed by persons certified hereunder to do so, and whether such devices have affixed thereto the necessary and proper amount of stamps as required by this ordinance. In addition to other penalties herein provided, the proper officers of Kitsap County shall, if any device or devices are found without the required amount of stamps affixed thereto, or are operated in violation of the terms of this ordinance, seize such devices and all merchandise displayed thereon or in connection therewith. All sums of money received by Kitsap County from the sale or disposal of each trade stimulator or device or merchandise seized or confiscated in connection therewith, shall be paid into the Current Expense Fund of Kitsap County.

Section 8. All moneys received from the sale of certificates and stamps under the terms of the ordinance shall be placed by the Auditor of Kitsap Couty in the Current Expense Fund of Kitsap County.

Section 9. It shall be unlawful for any person having such device in his possession, care or custody, to permit any person under the age of twenty-one (21) years to play or operate any devices such as described in section 1 hereof. Further, no location license shall be issued for, nor shall any such device as described in Section 1 hereof be used or operated in any building or place except in Locations licensed to dispense beer, within three hundred (300) feet of any school building or church.

Section 10. Any person or persons, firm or corporation, failing to comply with any part of this ordinance, rules or regulations pertaining thereto, or violating any of the provisions thereof, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than $300.00, or by imprisonment in the County Jail of Kitsap County for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 11. This ordinance shall take effect June 1, 1951, following final passage.

PASSED in regular session, this 30th day of April, 1951.

/s/ A. W. Hodge
Chairman of the Board

/s/ .....
Commissioner

/s/ E. M. Swan
Commissioner

(SEAL)

ATTEST:

/s/ .....

Clerk of the Board

419 AMENDMENT TO ORDINANCE NO. 11
(Resolution No.—4—1956)

AN ORDINANCE amending Sections 2 and 4 of Ordinance No. 11, Kitsap County, State of Washington.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS, KITSAP COUNTY, STATE OF WASHINGTON:

Section 1. That Section 2 of Ordinance No. 11, Kitsap County, be amended to read as follows:

Section 2. Every operator shall pay an annual license fee in the sum of $200.00 payable annually in advance, and upon the payment thereof to the County of Kitsap, such operators shall be issued an Operator's License and Operator's Number, which license shall entitle the said operator to vend "trade stimulators" to the location owners in Kitsap County. The license year shall be the calendar year, such fees shall not be prorated and the license shall not be transferable.

In addition to the Operator's License fee the operator shall pay license fees for each and every "trade stimulator" used, displayed or exposed to the public within Kitsap County such license fee to be paid in the form of stamps purchased from the County of Kitsap and used as hereinafter designated. To every "trade stimulator" or similar device used, displayed or exposed to the public there shall be attached thereto, stamps or imprints purchased from the County Auditor in such amounts as are hereinafter provided. It shall be unlawful for any operator in any place not issued a location license, to display or exhibit for use or play, or to sell, lease or rent to another for such purpose, any "trade stimulator" or device referred to in this ordinance.

Section 2. Section 4 of Ordinance No. 11 shall be amended to read as follows:

Section 4. In addition to operator's and location licenses as provided in this ordinance, stamps or imprints as provided herein shall be affixed to each "trade stimulator" by the Operator before such device may be leased, displayed, used or sold in Kitsap County, and the fee for such stamp or imprint shall be an amount equal to one (1%) per cent of the potential value or yield of any such device or trade stimulant. Such value shall be determined by multiplying the number of tickets or slips used in or on such device, by the money value of each such ticket or slips, irrespective of the method of attachment to the device or trade stimulant.

Each operator shall secure and retain in his possession in Kitsap County a Pitney-Bowes or other comparable stamping machine, which shall be used for the purpose of attaching the stamps provided for herein after payment therefor to the Kitsap County Auditor. Said stamping machines shall be kept at the regular place of business of the operator and shall be open to inspection by any officer or agent of the County of Kitsap at all reasonable hours. Whenever the size or construction of any "trade stimulant" prevents the direct stamping by the stamping machine the stamped tape produced by such machine may be attached, provided the same is cut or severed in not less than five places immediately following attachment. All stamps shall bear the name of the operator, amount of the stamp and date of affixing and serial number of the "trade stimulant."

Section 3. This ordinance shall take effect immediately following passage.

PASSED by the Board of County Commissioners, Kitsap County, Washington, this 16th day of January, 1956.

/s/ E. M. Swan
Chairman

/s/ .....
Commissioner

/s/ A. W. Hodge
Commissioner

(SEAL)

ATTEST:

/s/ Margaret McPherson
County Auditor and Clerk of the
Board of County Commissioners

421 RESPONDENT'S EXHIBIT NO. 8

State of Washington,
County of Kitsap—ss.

I, Margaret McPherson, Auditor of said County, do hereby certify that the foregoing is a true and correct copy of County Ordinance No. 11, with attached Amendment of January 16, 1956 as the same appears on file—record, being in Ordinance folder, in office of Kitsap County Auditor.

WITNESS my hand and official SEAL this 27th day of August, 1957.

Margaret McPherson,
County Auditor
By: Harold G. Baker
Deputy

422 RESPONDENT'S EXHIBIT 9a.

Amended by Ord. #610

ORDINANCE NO. 432

AN ORDINANCE REGULATING THE OPERATION OF PIN BALL AMUSEMENT DEVICES, PUNCH BOARDS, NUMBER SPINDLE GAMES, BINGO CARDS, POOL TABLES AND CARD TABLES, AND PROVIDING LICENSE FEES THEREFORE, AND PENALTIES FOR THE OPERATION OF THE SAME IN VIOLATION OF THIS ORDINANCE, AND REPEALING ORDINANCE NUMBER 460-A RELATING TO THE AFOREMENTIONED DEVICES. PUNCH BOARDS, POOL TABLES AND CARD TABLES..

THE CITY COUNCIL OF THE CITY OF KIRKLAND DO ORDAIN AS FOLLOWS:

SECTION 1. Ordinance Number 460-A is hereby repealed in toto.

SECTION 2. No pin ball amusement devices shall be operated in the City of Kirkland, unless the owner thereof shall first have secured from the City of Kirkland, a Master License for the operation of the same. Upon the payment to the Clerk of the City of Kirkland of an annual license fee of One Thousand Dollars ($1,000.00) for the fiscal year commencing July 1st and terminating on the following June 30th, anyone holding a valid Master License from the City of Kirkland may operate as many pin ball amusement devices thereunder, within the City of Kirkland, as he desires.

SECTION 3. No person shall hereafter operate within the City of Kirkland, Bingo Cards, Number Spindles, Dangling Ducats or similar merchandise or money games of chance, except merchandising punch boards, without having first paid to the City Clerk of the City of Kirkland

an annual license fee therefor, in the sum of Sixty Dollars ($60.00) for the current calendar year, or a license fee computed at the rate of Five Dollars ($5.00) per month, for each calendar month or fraction thereof remaining in the calendar year at the time application is made for said license. Each said license shall be good for one place of business only, and for the operation of as many said devices as the operator desires to install for the duration of said license period.

SECTION 4. The following license fees shall be paid to the Clerk of the City of Kirkland, by all persons desiring and securing the privilege of operating the amusement devices and games hereinafter further described:

All licenses herein provided for shall be paid in advance on the 1st day of each month, or of each year, as herein provided.

(a) Pin ball amusement devices

Ten Dollars ($10.00) per month for each machine, payable monthly on the 1st day of each month in advance. (Said individual machine license is in addition to the Master License hereinbefore provided for.)

(b) Merchandise punch boards only

Five per cent (5%) of the gross receipts thereof, payable in advance.

423 (c) Pool Tables

Ten Dollars ($10.00) per year per each table, payable on the 1st day of July for the fiscal year from July 1st to June 30th.

(d) Card Tables

Ten Dollars ($10.00) per year per each, payable on the 1st day of July of each year for the fiscal year from July 1st to June 30th.

SECTION 5. No person shall have in his possession any pin ball amusement device, without first having secured the right and privilege of operating said device on his premises from the City Council and having paid the license fees, as provided for herein.

SECTION 6. No minors shall be permitted to use or play any of the aforementioned devices, punch boards, bingo cards, number spindles, dangling ducats, pool tables or card tables.

SECTION 7. The police authorities of the City of Kirkland are hereby directed to have the provisions of this ordinance strictly enforced.

SECTION 8. This ordinance shall not affect the validity of any license issued before the same goes into effect, or licenses heretofore issued.

SECTION 9. No Master License provided for herein may be assigned nor may the holder thereof assign any rights whatsoever thereunder, without the consent of the City Council having been first obtained.

SECTION 10. The City Council may revoke or suspend for not to exceed six months any Master License or monthly license granted under the provisions of this ordinance, at any time upon proof being made to the satisfaction of said City Council that any machine operated under said Master License has been operated in violation of any of the provisions of any ordinance of the City of Kirkland then in effect. In the event of any such suspension or revocation, no refund shall be made on said license.

SECTION 11. If any section or sections of this ordinance shall be declared illegal or unconstitutional, the invalidity or illegality thereof shall not affect the rest and remaining portion of said ordinance.

SECTION 12. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 13. PENALTIES—(a) Any person violating any provision of this ordinance shall upon conviction thereof be punished by a fine of not more than Three Hundred Dollars ($300.00) or imprisonment for not more than ninety (90) days or both.

(b) The police judge shall, in his discretion, order removed from any premises in the City of Kirkland, any pin ball machines, punch boards, pool tables, card 424 tables, number spindles, bingo cards, dangling ducats, or like devices, if the person having the same in his possession shall permit minors to play such devices, and said person shall be convicted of such offense.

Passed and approved by the City Council of the City of Kirkland this 23rd day of June, 1947.

First reading the 16th day of June, 1947.

/s/ Harry M. Everett
Mayor

Attest:
/s/ C. F. Trent
Clerk
Approved by:
/s/ L. N. Ostrander
City Attorney

I hereby certify that the foregoing is a true and correct copy of an Ordinance of the City of Kirkland and that this was published or posted according to law said Ordinance being No. 532 and entitled "An Ordinance as above."

/s/ .....
City Clerk

Office Supreme Court, U.S.
FILED
MAR. 9 1961
JAMES R. BROWNING, Clerk

No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1960

PEERLESS PRODUCTS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General,

RICHARD A. SOLOMON,
JOHN J. VOORTMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

PAUL B. MOREHOUSE,
Acting General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission,
Washington 25, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-5a) is reported at 284 F. 2d 825. The order and opinion of the Federal Trade Commission (App. 90)[1] are unreported.

JURISDICTION

The opinion of the court of appeals was filed on November 30, 1960 (Pet. App. 1a), a petition for rehearing was denied on December 29, 1960 (Pet. App. 6a), and the final decree of the court was entered on

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[1] "App." refers to petitioners' appendix in the court of appeals, which has been filed with this Court.

January 4, 1961 (Pet. App. 7a-9a). The petition for a writ of certiorari was filed on February 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the sale and distribution in interstate commerce of devices designed or intended for the purpose of enabling others to sell merchandise by means of a game of chance violates the Federal Trade Commission Act.

2. Whether there was substantial evidence to support the Commission's finding that petitioners were engaged in distributing in interstate commerce devices designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act are as follows:

> Sec. 5(a)(1). Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. [66 Stat. 632 (1952), 15 U.S.C. 45(a)(1)]
>
> Sec. 5(a)(6). The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. [66 Stat. 632 (1952), 15 U.S.C. 45(a)(6)]
>
> Sec. 5(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * * [52 Stat. 113 (1938), 15 U.S.C. 45(c)]

STATEMENT

Petitioners are in the business of manufacturing punchboards and distributing them in interstate commerce (App. 10-11). Among the many types of punchboards sold by petitioners are blank boards on which the user or some intermediate party affixes "flares"—directions to the player as to the price of a punch and the nature of the prize to be won. Petitioners also sell or furnish flares which can be conveniently attached to their blank boards. A large number of the boards are distributed to dealers, who assemble them with their own flares or those supplied by petitioners or others, and sell them to retailers, often with various articles of merchandise. The retailers sell merchandise to the public through the sales of the punches or chances. Some of petitioners' punchboards, used in clubs and similar establishments, offer a prize in cash rather than merchandise. (App. 85-87; Pet. App. 2a-3a).

The Commission issued a complaint (App. 1-6) on February 1, 1957, charging that petitioners' interstate distribution of punchboards and flares used for the sale of merchandise by chance constituted unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). After hearing, the examiner found that the allegations of the complaint were sustained and entered a cease-and-desist order (App. 52-53). On appeal, the Commission remanded the case to the examiner to take further evidence on whether the practices were in interstate commerce (App. 54-55). After the further hearing on this question, the examiner again entered an initial decision and a cease-and-desist order (App.

82-89), which the Commission adopted on appeal (App. 90-93). The court of appeals unanimously affirmed (Pet. App. 7a).

ARGUMENT

It is well established that the interstate sale or distribution of punchboards to be used in the sale of merchandise in whole or in part by chance violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. See, *e.g.*, *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 313-4; *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744, 746 (C.A. 7); *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (C.A.D.C.), certiorari denied, 353 U.S. 917; *Seymour Sales Company* v. *Federal Trade Commission*, 216 F. 2d 633, 636 (C.A.D.C.), certiorari denied, 348 U.S. 928.

As the court below correctly found (Pet. App. 3a), the evidence in this case "fully supports the Commission's findings" that petitioners are engaged in distributing devices designed to be used in the sale of merchandise to the public by means of a game of chance. The plain, or blank, punchboards manufactured by petitioners are designed to be readily adaptable for use as merchandise boards (App. 13-15). Thus, petitioners' flares (Commission Exhibits 4-A, 4-B, 6 and 7, App. 94) state that certain specified numbers will receive prizes such as a carton or several packs of cigarettes. Such flares are furnished with petitioners' blank boards (App. 13-14), and these boards can thus be used to distribute any kind of merchandise (App. 15). Petitioners' boards are, in fact, so

used (*e.g.*, App. 21-25, 35-36; Pet. App. 3a). Indeed, tified they had rarely, if ever, heard of petitioners' blank boards being used for any purpose other than merchandise boards (App. 63, 68, 78). Such evidence clearly is not offset by statements of a few witnesses that they had on occasion seen petitioners' boards used in clubs and similar places as cash boards.

That petitioners themselves do not participate in the ultimate sales of punches in retail establishments or that some of the boards are subsequently used as cash boards does not, as petitioners argue, invalidate the order. *James* v. *Federal Trade Commission*, 253 F. 2d 78, 80 (C.A. 7); *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483. Nor is the Commission precluded from enjoining the shipment of punchboards in interstate commerce because some communities allow and regulate their intrastate use. *Royal Oil Corporation* v. *Federal Trade Commission*, 262 F. 2d 741 (C.A. 4).

witnesses who used or dealt in petitioners' boards tes-

CONCLUSION

The decision of the court below is clearly correct and no substantial questions meriting further review are presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General.

RICHARD A. SOLOMON,
JOHN J. VOORTMAN,
Attorneys.

PHILIP B. MOREHOUSE,
Acting General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,
Federal Trade Commission.

MARCH 1961.

U. S. GOVERNMENT PRINTING OFFICE 1961—888087/P. C. 884